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COURT OF CRIMINAL APPEALS
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Case No. PD-0388-19

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COURT OF CRIMINAL APPEALS
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In the
COURT OF CRIMINAL APPEALS
OF TEXAS

CHASE ERICK WHEELER
Appellant and Respondent,
v.

THE STATE OF TEXAS
Appellee and Petitioner.

From the Court of Appeals for the Second District of Texas
Case No. 02-18-00197-CR
Appeal from Case No. 1473192 in
County Criminal Court No. 3 of Tarrant County, Texas
The Hon. Bob McCoy, Judge Presiding

APPELLANT AND RESPONDENT'S BRIEF

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Table of Contents

Index of Authorities

Federal Cases

Other Authorities

Issue in Response

The Texas Constitution has three simple rules for a valid warrant. For a warrant in obvious and complete violation of one of those rules—the oath requirement, could an objectively reasonable officer believe that the warrant was not unconstitutionally tainted?

Statement of Facts

Pantego, Texas, is a one-square-mile town surrounded by Arlington, Texas. Its police department is correspondingly small and usually staffs its night shift with one officer. (RR2 11).[1] During the early-morning night shift on July 9, 2016, Pantego Police Department Officer Tyler Bonner arrested Respondent Chase Erick Wheeler for Driving While Intoxicated. (CR 6). Mr. Wheeler refused to submit to any field sobriety tests and refused to provide a breath or blood sample. (RR 3 10-13). The Officer transported Mr. Wheeler and, at 3:20:03 a.m. (RR3 SX-4 at 2), arrived at the house which serves as the Pantego PD headquarters and dispatch center. (RR2 60-61).

The Officer then retrieved a preprinted, boilerplate search warrant packet containing several forms. (RR2 8). Included in the packet was a "check-box" and fill-in-the-blank form Affidavit for Search Warrant and Magistration,[2] a form search warrant, a form order to execute the warrant, and a form return. (RR2 8, RR3 DX-3). The Affidavit included a recital after the affiant's

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[1] In the interest of clarity and brevity: (1) notations to the appellate record and authorities are cited in the body, (2) explanatory parentheticals and notes are in footnotes, and (3) The Texas Code of Criminal Procedure is often abbrieviated as "CCP."

[2] Referred to as the "Affidavit."

signature stating that it was supposed to be subscribed and sworn before an official authorized to administer and authorize an oath pursuant to TEX. GOV'T CODE § 602.002. (RR2 10; RR3 DX-3 at 7).

With scribbles in the blanks and with circled words, the Officer documented probable cause for his belief that Mr. Wheeler's blood contained evidence of intoxication. (RR3 DX-3 at 1; RR2 27). There is no evidence that his scribbles and circles were fabricated or untruthful. (RR2 20). The Officer also signed the Affidavit in the blank labeled "Affiant" and dated the jurat. (RR2 10; RR3 DX-3 at 7).

Despite his awareness of oaths (RR2 17-18) and that officers must swear to affidavits under oath (RR2 26), the Officer never swore to Mr. Wheeler's Affidavit under oath or affirmation to anyone. (RR2 18). Nor did anyone witness him signing the Affidavit. (RR2 18). Further, the Officer testified that he had never sworn to any search warrant affidavits under oath in his fourteen months at Pantego PD.[3] (RR2 19).

[3] At the time of the December 19, 2017, Motion to Suppress hearing, the Officer was employed at his third police department within a three-year span. (RR2 7).

The Officer attended a law enforcement training academy from January to May of 2015. (RR2 24). During his academy training, his instructors spent much time teaching him the constitutional issues related to searches and seizures. (RR2 24-25). This included specific training on the requirements of the Fourth Amendment and of Article I § 9 of the Texas Constitution. (RR2 25). The Officer acknowledged that he had been trained that when an officer writes a search warrant affidavit, it has to be sworn under oath. (RR2 25-26).

The Officer's failure to swear to any search warrants under oath while employed with Pantego PD contravened his academy training. (RR2 26). But because no one at Pantego PD had reiterated that training, (RR2 19), the Officer believed he was following departmental standard procedure. (RR2 20).

After he signed the Affidavit, the Officer then scribbled in Mr. Wheeler's identifying information to the form search warrant. (RR3 DX-3 at 8). He then signed the return and inventory form indicating he had already executed the search and seizure. (RR3 DX-3 at 10)[4]. After completing the preprinted

[4] The Officer could not remember whether he signed the Return before or after he executed the search. (RR2 10). However, the Magistrate said that the Return was already signed when she received the packet from the Dispatcher. (RR2 45).

boilerplate packet, the Officer walked to the dispatch center in the middle of the house (RR2 61), where he handed the packet to Pantego PD Dispatcher Donna Stewart.[5] (RR2 11). The Dispatcher scanned and uploaded it to a Dropbox account, and then made a phone call at 3:44:16 a.m. (RR2 12-13; RR3 SX-4 at 1) to Pantego Magistrate Sara Jane Del Carmen,[6] who was a part-time municipal judge and civil lawyer. (RR2 30-32).

Awakened at home by the Dispatcher's call, the Magistrate reviewed the Affidavit to assess probable cause. (RR2 38). After she determined that the Affidavit established probable cause (RR2 68), she electronically signed the search warrant and the Affidavit's jurat indicating that the Officer had subscribed and swore to the Affidavit before her. (RR2 51, RR3 SX-5 at 7). But that never happened. (RR2 54). It could not have happened because the Magistrate had no communication—in person, telephonically, or electronically—of any kind with the Officer that morning. (RR2 52). Even if

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[5] The Dispatcher did not testify at the Motion to Suppress hearing. The trial court took judicial notice that she had been terminated on March 8, 2017, for "the creation of fictitious, racial profiling codes" on documents. (RR2 76-77).

[6] The Magistrate was employed by the City of Pantego from November 2012 to September 30, 2016. (RR2 31).

the Officer had called her, she would not have recognized his voice. (RR2 55). Nor would she have recognized the Officer or his signature. (RR2 55).

After she electronically signed the Affidavit and search warrant,[7] the Magistrate uploaded it back to Dropbox and, per her standard policy and practice (RR2 51), went back to sleep without notifying the Dispatcher that she had signed the warrant. (RR2 51-52). The Pantego PD Call Sheet Report indicates that the "blood warrant [was] back and signed" at 3:48:56 a.m.—four minutes and forty seconds after the Dispatcher's awakening call to the Magistrate. (RR3 SX-4 at 1).

The Officer testified that the standard practice was for the Dispatcher to print the signed warrant and to deliver it to him. (RR2 14, 24). That also did not happen here. (RR2 24). Instead, the Dispatcher just verbally informed him that the Magistrate had returned a signed warrant. (RR2 14, 20). This contravened Pantego PD procedures per the Department's Blood Room

[7] The Magistrate testified that she signed the Affidavit's jurat in error because she missed that the Officer's Affidavit had not been sworn to. (RR2 38-39, 67-68). She also testified that "ordinarily there would be another signature on that line that it had been sworn to . . ." and that when she received it in this case, the only signature on the Affidavit was the affiant's. (RR2 53, 67, 72-73; RR3 DX-3 at 7).

Procedure Form. (RR3 DX-2). That form's first line states: "Before bringing the suspect into the blood draw room you **must** have a signed consent search blood form OR a signed search warrant for the suspects blood." (RR3 DX-2).[8] The next line requires the officer to indicate whether the search is being conducted pursuant to consent or to a warrant. (RR3 DX-2). This Officer left that indication blank. (RR3 DX-2). He could not remember why he failed to circle whether he had a search warrant or not. (RR2 21, RR3 DX-2). The Blood Room Procedure Form also contains a checklist of procedures that the blood draw technician is supposed to follow. (RR3 DX-2). But instead of blank spaces for the technician to check off compliance with those procedures, the checkmarks are part of the form's boilerplate. (RR3 DX-2).

The Officer also could not remember if he ever saw a signed search warrant that morning.[9] (RR2 14, 17, 24). However, if he had received the signed search warrant from the Dispatcher, he would have included it in Mr. Wheeler's file at the Pantego PD. (RR2 24). That also did not happen.

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[8] Emphases in original.

[9] The Officer agreed that the lack of an indication on the Blood Room Procedure Form as to whether there was a search warrant insinuated that he never saw a signed search warrant in this case. (RR2 17).

(RR2 24). The Pantego PD did not have a signed search warrant in its files and it was never able to produce one.[10] (RR2 14, 24, 59). Regardless, the Officer searched Wheeler's body by directing a draw of his blood at 3:58:20 a.m. (RR3 SX-4 at 1).

As for the search warrant Return and Inventory Form already bearing the Officer's signature, (RR3 DX-3 at 10), the Magistrate testified that it was not typical for Pantego officers to sign the return before the warrant was issued. (RR2 45).

On September 19, 2017, Mr. Wheeler filed a Motion to Suppress the blood evidence. In denying that Motion, the trial court relied primarily on its interpretation of "the exact wording of [the good faith exception statute]." (CR-29). In reversing the trial court, the Court of Appeals for the Second District of Texas held that, under *McClintock v. State*, 541 S.W.3d 63 (Tex. Crim. App. 2017), no objectively reasonable officer could rely in good faith on a warrant tainted by the complete absence of an oath—a constitutional

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[10] Almost a year after the blood draw was conducted, the Magistrate found a copy of the signed search warrant in her personal digital files and provided it to the Tarrant County Criminal District Attorney's office on June 27, 2017. (RR2 60, 70; RR3 SX-5 at 8-9).

warrant requirement. *Wheeler v. State*, 573 S.W.3d 437, 446. (Tex. App.—Fort Worth 2019, pet. granted).

Summary of the Argument

The Texas Constitution has three rules for a valid warrant to issue—particularity, probable cause, and oath or affirmation. This case is about a defective search warrant in obvious violation of the third rule.

In *McClintock* this Court established that, for defective warrants tainted by prior illegalities, the good faith exception applies an objectively reasonable officer test. In summary, the objectively reasonable officer asks: "Can I believe this warrant is without unconstitutional taint?" If the answer is yes, then the good faith exception applies. Here the answer is no. On the facts of this case, no objectively reasonable officer could believe that this warrant was close to *McClintock's* line of validity and was without unconstitutional taint.

Warrants missing signatures, dates, or otherwise triflingly afflicted easily pass *McClintock's* objectively reasonable officer test. This is not because they often arise in subjective good faith, but because they fall far closer to *McClintock's* line of validity than do warrants afflicted by obvious violations of constitutional rules. The Fort Worth Court correctly applied *McClintock* to this case by holding the good faith exception inapplicable. Mr. Wheeler asks this Court to do the same.

Argument

A. The Texas Constitution's rules for a valid warrant: Rules One, Two, and Three.

The Texas Constitution has three simple rules for a valid warrant to issue:

> Rule One: Particularity.
> The warrant must describe the person, place, or thing to be searched or seized "as near as may be."
>
> Rule Two: Probable Cause.
> The warrant shall not issue without probable cause.
>
> Rule Three: Oath or Affirmation.
> The probable cause must be supported by oath or affirmation.
>
> *See* TEX. CONST. art. I, § 9.

A purported warrant in violation of one or more of these rules is therefore unconstitutionally tainted and invalid. Rule Three is just as important and indispensable as Rules One and Two. *See Clay v. State*, 391 S.W.3d 94, 97 (Tex. Crim. App. 2013);[11] *see also* 2 Wayne R. LaFave, *Search and Seizure* § 4.3.[12] But these three rules of constitutional validity, simple as they are, do

[11] Describing the oath as "both constitutionally and statutorily indispensable."
[12] 5th ed. 2012 ("Although some contend that compliance with constitutional oath or

not provide much guidance to police officers on how to avoid violating them. That is left up to the to the legislature and to the courts.

Take **Rule One**, Particularity. This Court has said that Rule One is not necessarily violated by a warrant's use of the general legal term "premises" that authorizes officers to search structures within the curtilage of a particularly described property. *See Long v. State*, 132 S.W.3d 443, 448 (Tex. Crim. App. 2004).[13] But Rule One *is* violated if the warrant authorizes a "search zone" permitting the indiscriminate probe of all things and persons passing through it. *State v. Barnett*, 788 S.W.2d 572, 577 (Tex. Crim. App. 1990).

Similarly, numerous courts have defined what **Rule Two**, probable cause, requires. Rule Two requires the facts within the warrant affidavit to establish that, under the totality of the circumstances, there is a fair probability that contraband or criminal evidence will be found at the specified search location. *E.g. McClintock v. State*, 541 S.W.3d 63, 68 (Tex. Crim. App. 2017). Fair

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affirmation requirements are mere technical irregularities that do not require evidence suppression, this is not the case.")

[13] Citing *Comeaux v. State*, 118 Tex. Crim. 223, 228-29, 42 S.W.2d 255, 258 (1931).

probability is not precisely defined, but it must be based on more than bare conclusions. *See State v. Elrod*, 538 S.W.3d 551, 557-58 (Tex. Crim. App. 2017).

As for **Rule Three**, the rule violated here, Texas courts have defined its contours primarily through the excusal of oath-related peccadillos. For example, the failure to memorialize an oath's administration with a signature does not violate Rule Three. *See Smith v. State*, 207 S.W.3d 787, 792 (Tex. Crim. App. 2006);[14] *see also Brent v. State*, 916 S.W.2d 34, 37-38 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd).[15] This is partially because the plain text of Rule Three does not require a signature, it only requires an oath. *Smith*, 207 S.W.3d at 790.

The text of Rule Three also does not say before which type of official an oath must be made. It could be a prosecutor instead of a magistrate. *See Flores v. State*, 367 S.W.3d 697, 703 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). It could be before a fellow peace officer engaged in the performance of

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[14] The *Smith* Court was technically referring to the United States Constitution, but that Constitution contains Rule Three language identical to that of the Texas Constitution.

[15] Noting that the affiant officer, who had failed to sign his affidavit, had "raised his hand and swore that all the information was correct."

and his duties. TEX. GOV'T CODE § 602.002(17). And when it is made before a fellow peace officer, Rule Three does not say exactly how that must occur. *See Ashcraft v. State*, No. 03-12-00660-CR, 2013 Tex. App. LEXIS 10402 (Tex. App.—Austin, Aug. 20, 2013, no pet.);[16] *see also Longoria v. State*, No. 03-16-00804-CR, 2018 Tex. App. LEXIS 8675 (Tex. App.—Austin, Oct. 25, 2018, no pet.).[17]

In *Ashcraft*, the affiant officer had called dispatch to send a second officer to his location for purposes of swearing to his affidavit under oath. *Ashcraft*, 2013 Tex. App. LEXIS 10402, at *16. When the second officer arrived, she witnessed the affiant officer subscribe (sign) his affidavit but she failed to verbalize the recitation of the oath. *Id.* at *18-19. The court held that it was not an abuse of discretion to consider that, under these facts, this was a valid oath that would subject the affiant to perjury. *Id.* at *21. An oath is valid to sustain a perjury charge "[w]hen there is some form of an unequivocal and present act, in the presence of the officer authorized to administer the oath, whereby the affiant consciously takes on himself the obligation of the oath."

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[16] Mem. op., not designated for publication.
[17] Mem. op., not designated for publication.

Id. at *20-21. [18]

Similarly, in *Longoria*, the affiant officer subscribed his affidavit before a second officer at the arrest scene. *Longoria*, 2018 Tex. App. LEXIS 8675, at *4. But, just like in *Ashcraft*, the affiant officer did not formally swear the oath in front of the second witnessing officer. *Id.* at *12. After signing the affidavit before the second officer and having that officer notarize his signature, the affiant officer then sent it to the magistrate, whom he talked to personally on the telephone. *Id.* at *4, 12-13. Without deciding whether this "improperly sworn" warrant violated Rule Three, *see Id.* at *9-10,[19] the court held that it was not an abuse of discretion to deny appellant's motion to suppress because these facts demonstrated objective good faith reliance on the warrant. *Id.* at *14.

Unlike *Ashcraft* and *Longoria*, the Officer here took no unequivocal act in the presence of an officer authorized to administer an oath. (RR2 18). This fact is undisputed. Pet'r's Br. 10. No one witnessed this Officer sign his Affidavit.

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[18] Quoting *Vaughn v. State*, 177 S.W.2d 59, 60, 146 Tex. Crim. 586 (Tex. Crim. App. 1943).

[19] The appellant also contended that the warrant violated the United States Constitution and CCP 18.01(b), at *6.

(RR2 18). And because she would not have recognized the Officer's signature (RR2 55), the Magistrate could not have known whether the signature on the Affidavit was even that of its purported affiant. In this case, no one verified the identity of the Affidavit's affiant. *See Clay*, 391 S.W.3d at 103.[20] The cold record of this case contains no evidence that the Officer signed his affidavit with a sense of seriousness and responsibility or with a sense of moral duty to tell the truth. *See Wheeler*, 573 S.W.3d at 443.[21] These are singular and unusual facts that establish an obvious and complete Rule Three violation.

And the three Rules—particularity, probable cause, and the oath—are paramount. Violation of any one of them results in an unconstitutionally tainted and invalid warrant.

B. No objectively reasonable officer could believe that a warrant in obvious and complete violation of a constitutional rule was without unconstitutional taint.

For the statutory good faith exception to prevent exclusion of evidence, a law enforcement officer must be acting in objective good faith reliance upon a

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[20] Describing the importance of verifying the identity of an affiant in the context of telephonic oaths.

[21] Citing *Smith*, 207 S.W.3d at 790.

warrant issued by a neutral magistrate based on probable cause. TEX. CODE. CRIM. PROC. art. 38.23(b).[22] The closest this Court has come to defining what objective good faith reliance means was its opinion interpreting 38.23(b) in *McClintock*. With respect to the three Rules, *McClintock* involved Rule Two, probable cause. *See McClintock*, 541 S.W.3d at 68. But the warrant issued in that case did not violate Rule Two—it established probable cause. *Id.*[23] The question before this Court was how 38.23(b) should apply, if at all, when the warrant's probable cause has been tainted by a prior illegality. *Id.* at 66. The prior illegality in *McClintock* was a constitutional violation: a warrantless drug-dog sniff within the curtilage of a residence. *Id.* at 73. Without the information from the drug-dog sniff, the warrant would have violated Rule Two. However, at the time the officers conducted the sniff, U.S. Supreme Court precedent concerning drug-dog sniffs was not crystal clear. *Id.* at 74. In light of that, this Court held that this drug-dog sniff was "close enough to the line of validity" for an objectively reasonable officer to believe the warrant

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[22] Emphasis added.

[23] "There is no question that the totality of the circumstances presented to the magistrate in this case . . .supplied ample probable cause."

was not tainted by unconstitutional conduct. *Id.*

1. *McClintock's* objectively reasonable officer test.

Under *McClintock* then, the following test is inferable for determining if an officer's reliance upon a defective warrant under 38.23(b) was in objective good faith.

> **Test:** Whether the defect afflicting the warrant is close enough to the line of validity for an objectively reasonable officer to believe that the warrant was not unconstitutionally tainted.

The Petitioner states in its Brief that the objectively reasonable officer "stand[s] in the shoes of the officer in the case at hand." Pet'r's Br. 12. That may be true if the objectively reasonable officer is considering defects related to prior law enforcement conduct that he intends to support his affidavit with. But *McClintock's* objectively reasonable officer can also stand in the shoes of an officer asked to rely on and to execute a warrant knowing all the circumstances concerning its defect. *See McClintock*, 541 S.W.3d at 73;[24] *cf.*

[24] Stating that the objectively reasonable officer could be "preparing the affidavit or executing the warrant . . ." (emphasis added).

Herring v. United States, 555 U.S. 135, 145 (2009).[25]

In the context of the Constitution's Rules One, Two, and Three, consider how *McClintock's* objectively reasonable officer would react if asked to rely on and to execute the following defective warrants.

a. *McClintock's* test applied to Rule One, Particularity

> **Hypothetical:** In preparing his search warrant affidavit, the affiant officer fails to include any description whatsoever of the place to be searched. His failure to do so is borne not from bad faith, but from mistake. Whether due to incompetence or poor training, he mistakenly believes that his department's procedures allow officers to document the particular place to be searched after the search is conducted. Awakened in the middle of the night, the neutral and detached reviewing magistrate fails to notice the warrant's obvious violation of Rule One. She issues the warrant and goes back to sleep.

No objectively reasonable officer, if asked to execute this warrant, could believe that its obvious violation of Rule One, no particularity whatsoever, was close to the line of validity. This warrant would amount to no more than

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[25] "We have already held that our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances." (emphasis added).

the type of general warrant loathed by our founding fathers. *See Long*, 132 S.W.3d at 448.[26] Regardless of this warrant's issuance by a neutral and detached magistrate, no objectively reasonable officer could believe this warrant was without unconstitutional taint. *Cf. United States v. Leon*, 468 U.S. 897, 923 (1984).[27]

b. *McClintock's* test applied to Rule Two, Probable Cause

> **Hypothetical:** In preparing his search warrant affidavit, the affiant officer includes only the following "fact"—really just a bare conclusion—to establish probable cause: "Based on my training and experience, I believe that the place to be searched contains contraband." His failure to include any other facts establishing probable cause is not borne from bad faith, but from mistake. Whether due to incompetence or poor training, he mistakenly believes that a police officer's training and experience alone is sufficient to establish probable cause. Awakened in the middle of the night, the neutral and detached reviewing magistrate fails to notice the warrant's obvious violation of Rule Two. She issues the warrant and goes back to sleep.

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[26] "Obedience to the particularity requirement . . . is therefore essential to protect against the centuries-old fear of general searches and seizures."

[27] Noting that, for the judge-made federal good-faith exception, officers cannot reasonably presume that a warrant failing to particularize the place to be searched is constitutionally valid.

No objectively reasonable officer, if asked to execute this warrant, could believe that this classic "barebones" affidavit lacking probable cause was close to the line of validity. And, shocking as it may be, neutral and detached magistrates do sometimes issue warrants based upon facially invalid barebones affidavits. *See Spencer v. Staton*, 489 F.3d 658, 661 (5th Cir. 2007);[28] *see also Blake v. Lambert*, 921 F.3d 215, 220-21 (5th Cir. 2019). A magistrate's review and approval of a warrant is therefore not a magic wand that categorically enchants the warrant with unreviewable validity. *McClintock's* objectively reasonable officer would use her own reason and judgment when reviewing the validity of a warrant. *Contra* Pet'r's Br. 20.[29]

As for Rule Two, the Texas statutory good faith exception has an additional protection beyond *McClintock's* objectively reasonable officer. To illustrate that protection, consider an issued warrant that is not an obvious barebones violation of Rule Two. But when scrutinized by subsequent judicial review, that warrant is found to lack probable cause. The objectively

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[28] Modified on other grounds on reh'g, U.S. App. LEXIS 17897 (5th Cir. 2007) (per curiam).

[29] Arguing that "[a]n objectively reasonable officer would likely consider a warrant that was approved and signed by the magistrate to be valid."

reasonable officer is no judge, so she might rightfully believe this warrant was without unconstitutional taint. But even if it had been issued by a neutral magistrate, the Texas statutory good faith exception still would not apply. *See* 38.23(b);[30] *contra Leon*, 468 U.S. at 926.

But when reviewing a warrant that obviously violates Rule Two, one "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," *Leon*, 468 U.S. at 923, *McClintock's* objectively reasonable officer could not consider it to be close to the line of validity such that it was without unconstitutional taint.

c. *McClintock's* test applied to Rule Three, Oath or Affirmation

> **Hypothetical:** In preparing his search warrant affidavit, the affiant officer does not support his affidavit with oath or affirmation. His failure to do so is not borne from bad faith, but from mistake. Whether due to incompetence or poor training, he mistakenly believes that his department's standard procedure did not require him to swear to his affidavits under oath or affirmation. Awakened in the middle of the night, the neutral and detached reviewing magistrate fails to notice the affidavit is in obvious violation of Rule Three: there is no evidence that the affidavit was sworn before another officer or notary before being sent to her. She issues the warrant

[30] Requiring that the warrant be "based upon probable cause."

and goes back to sleep.

No objectively reasonable officer, if asked to execute this warrant, could believe that a warrant affidavit that is completely unsworn was close to the line of validity and was therefore without unconstitutional taint. *See Wheeler*, 573 S.W.3d at 446.

The Court of Appeals for the Second District did not create any bad law. *Contra* Pet'r's Br. 13. It merely applied this Court's law from *McClintock* to facts that are "admittedly bad," *Id.*, that are "singular and unusual" *Wheeler*, 573 S.W.3d at 447, and that are in obvious violation of the Constitution's third simple Rule.

2. The answer to Petitioner's question before the Court therefore is: It depends.

The Petitioner asks this Court if an officer can act in objective good faith by relying on the magistrate's approval of a warrant that is defective in form. Pet'r's Br. 7. The answer to that question is: it depends whether the warrant's defect is close enough to the line of validity for an objectively reasonable officer to believe that the warrant was not unconstitutionally tainted. *See McClintock*, 541 S.W.3d at 74.

It would be unusual for the garden-variety warrant defect to fail *McClintock's* test. As a threshold point, *McClintock's* objectively reasonable officer worries only about unconstitutionally-tainted warrants, not warrants tainted by violation of extraconstitutional requirements. *See McClintock*, 541 S.W.3d at 74. And surveying 38.23(b) cases shows that most of them have applied the good faith exception to warrants tainted by violations of extraconstitutional requirements imposed by statutes. *See Dunn v. State*, 951 S.W.2d 478, 479 (Tex. Crim. App. 1997),[31] *Woods v. State*, 14 S.W.3d 445, 449 (Tex. App.—Fort Worth, 2000, no pet.),[32] *Pratt v. State*, No. 02-16-00395-CR, 2018 Tex. App. LEXIS 3790, at *21-22 (Tex. App.—Fort Worth, May 3, 2018, pet. ref'd),[33] *Flores*, 367 S.W.3d at 703,[34] *Cole v. State*, 200 S.W.3d 762, 765-66 (Tex. App.—Texarkana 2006, no pet.),[35] and *Brent*, 916

[31] Applying 38.23(b) to excuse violation of CCP 15.02(3) (magistrate must sign arrest warrant).

[32] Applying 38.23(b) implicitly, via *Dunn*, to excuse violation of CCP 15.02(2) (arrest warrant must name arrest offense).

[33] Mem. op., not designated for publication (also excusing CCP 15.02(2) violation).

[34] Applying 38.23(b) to excuse violation of CCP 15.03(a)(2) (oath for an arrest warrant should be made before a specific official—a magistrate).

[35] Applying 38.23(b) to excuse violation of CCP 18.04(4) (search warrant must be dated and signed by the magistrate).

S.W.2d at 37-39;[36] *but see State v. Arellano*, 571 S.W.3d 422, 426-427 (Tex. App.—Corpus Christi, 2019, pet. granted).[37]

Of course, there are statutes that have requirements similar or identical to the Constitution's three Rules. *Compare* TEX. CONST. art. I, § 9 *with* TEX. CODE CRIM. PROC. arts.18.04(2), 18.01(b), 18.01(c), and 1.06.[38] Regardless, warrants tainted by violations of these statutes would usually be close enough to the line of validity for the objectively reasonable officer to believe that the warrant was not unconstitutionally tainted.

For example, in *Crawford*, the warrant potentially violated CCP 18.01. *State v. Crawford*, 463 S.W.3d 923, 931 (Tex. App.—Fort Worth 2015, pet. ref'd). The affiant officer swore to his affidavit under oath in front of a fellow officer. *Id.* at 927. However, the affidavit's jurat indicated that the officer had sworn the oath in front of a magistrate instead of the fellow officer. *Id.* Regardless of whether this defective jurat violated CCP 18.01, *McClintock's*

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[36] Applying 38.23(b) to excuse violation of CCP 15.05(4) (affiant must sign an arrest complaint affidavit).

[37] Declining to apply 38.23(b) to excuse violation of CCP 18.04(5) (magistrate's name must appear in clearly legible handwriting or in typewritten form with the signature).

[38] Requiring, respectively: particularity, a sworn affidavit (oath), particularity and probable cause, and the same requirements as the Constitution's three Rules.

objectively reasonable officer would believe that one officer swearing to his affidavit under oath before a fellow officer would clear the line of constitutional validity in the context of Rule Three. *Cf.* Tex. Gov't Code § 602.002(17)(A) (West 2018).[39]

It is only where there is an obvious and complete violation of a constitutional rule that the defect would be so far from the line of validity that *McClintock's* objectively reasonable officer would immediately know that the warrant was unconstitutionally tainted.

Ashcraft and *Longoria* would not fit that definition in the context of Rule Three's oath requirement. As described *supra*, in both cases the affiant officer engaged in some form of an unequivocal and present act, in the presence of another officer authorized to administer the oath, whereby the affiant officer consciously took upon himself the obligation of the oath. *See Ashcraft*, 2013 LEXIS 10402 at *18-19; *Longoria*, 2018 Tex. App. LEXIS 8675, at *4. In *Longoria* in particular, the record reflected that the affiant officer thought he had complied with the oath requirement and no evidence contradicted his oath

[39] Authorizing a peace officer acting in the performance of his duties to administer an oath to a fellow officer.

recital in the issued warrant. *Id.* at *4-6.

The mere fact that the affiant officers in *Ashcraft* and *Longoria* did not technically raise their right hands and verbally swear their oaths before their fellow officers might bother *McClintock*'s paradigmatic officer. That bother might make her consider the warrants "improperly sworn" under CCP 18.01. But if asked to rely on and to execute the warrants in *Ashcraft* and *Longoria*, she could reasonably believe that those cases were close enough to the line of validity for purposes of Rule Three's oath.

3. The Legislature could not have intended 38.23(b)'s objective good faith standard to mean the absence of bad faith.

When this Court considers legislative intent, it looks to the plain meaning of a statute's language. *McClintock*, 541 S.W.3d at 67. CCP 38.23(b)'s language provides that, for the good faith exception to apply, there must be "objective good faith reliance" upon the issued warrant. *Id.*

Petitioner's argument seems to be that the plain meaning of "objective good faith" is "the absence of bad faith." Pet'r's Br. 11, 14.[40] This is a logical

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[40] At 11 ("The good faith exception is meant to cover the gap between the perfect warrant and the 'false' warrant, i.e., a warrant obtained by false statements or illegal police conduct."); at 14 ("In other words, the courts should apply the good faith exception

fallacy. Bad faith might be a condition sufficient to negate objective good faith, but it is not necessary to do so. For example, if an officer knowingly included materially false statements (i.e. lies) in his warrant affidavit, *see* *Franks v. Delaware*, 438 U.S. 154 (1978), no objectively reasonable officer could believe that this conduct was close to line of validity. Asked to execute and rely upon this warrant borne from bad faith, *McClintock's* objectively reasonable officer would refuse to do so because of its unconstitutional taint. But, as shown in the hypotheticals *supra*, bad faith is not a condition necessary to negate objective good faith. There are situations where constitutional violations arising from negligence, incompetence, or a good faith lack of awareness would fail *McClintock's* test. Consider this:

> **Hypothetical:** An officer arrests a suspect and puts her in custody within his police car. The officer is good-hearted and truthful, but "perhaps inexperienced as an officer."[41] And unfortunately, his department did not emphasize his academy training on *Miranda*—he mistakenly believes that, per his department's standard procedures, suspects can only be considered "in custody" for *Miranda* purposes after being booked at the station. He is "perhaps uneducated regarding

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whenever possible unless there is actual bad faith on the part of the officer or magistrate.").

[41] *See* Pet'r's Br. 16.

> proper" *Miranda* requirements.[42] Without *Miranda* warnings, the officer conducts a custodial interrogation of the suspect in his police car. In doing so, he "did not act maliciously or with bad faith."[43] Using information gained from that interrogation, he establishes probable cause for a search warrant on the suspect's house, which the affidavit particularly describes. After swearing to his affidavit under oath before a neutral and detached magistrate, she issues the warrant.

If asked to rely on and execute this search warrant, *McClintock's* objectively reasonable officer would not do so. This conduct could not be close enough to the line of validity to believe that this warrant was without unconstitutional taint. And this warrant has no bad faith. It even has subjective good faith. What it lacks is objective good faith. For that reason, the plain text of 38.23(b)'s good faith exception could not save it.

Interpreting objective good faith to mean the absence of bad faith would lead to the absurd result of CCP 38.23(b) forgiving the warrants described in the hypotheticals for Rules One and Three *supra*. The legislature could not have intended 38.23(b)'s standard to have that meaning. *Cf. Boykin v. State*,

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[42] *See Id.* 23.
[43] *See Id.* 16.

818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

C. 38.23(a)'s exclusionary rule is meant to deter more than actual bad faith on the part of the officer.

38.23(a) is meant to deter exactly what its plain text says: officers or other persons obtaining evidence in violation of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America. TEX. CODE CRIM. PROC. art. 38.23(a). It says nothing of actual bad faith. But Petitioner cites *Swenson v. State*, No. 05-09-00607-CR, 2010 Tex. App. LEXIS 1832 (Tex. App.—Dallas, Mar. 16, 2010)[44] to imply that 38.23(a)'s exclusionary rule should apply only when there is actual bad faith on the part of the officer. Pet'r's Br. 14. This Court has never said that the only purpose of 38.23(a)'s exclusionary rule is to deter actual bad faith on the part of the officer. It has not even said that is the primary purpose. Rather, the primary purpose of 38.23(a)'s exclusionary rule is "to deter unlawful actions which violate the rights of criminal suspects in the acquisition of evidence for prosecution." *Wilson v. State*, 311 S.W.3d 452, 458-59 (Tex. Crim. App.

[44] Mem.op., not designated for publication.

2010);[45] *Brick v. State*, 738 S.W.2d 676, 679 N.5 (Tex. Crim. App. 1987).[46]

Regardless of whether an officer believes he is following departmental procedures, he commits an unlawful action when he knowingly fails to swear to his search warrant affidavit under oath. That action may not violate substantive penal law, but it obviously violates Rule Three of our State's most supreme law. Further, an officer's good faith or "pure motive" concerning his unlawful actions does not render 38.23(a) inapplicable to the evidence obtained as a result of that violation. *See Wilson*, 311 S.W.3d at 465.

As a policy point, exclusionary rules also may be used to deter police mistakes that result from recurring or systemic negligence. *See Herring*, 555 U.S. at 144. There is arguably systemic negligence when a police department's procedures allow an officer—for fourteen months—to knowingly fail to support all of his DWI affidavits with an oath. (RR2 30). This is precisely the type of case where the deterrent effect of 38.23(a)'s exclusionary rule would

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[45] Emphasis added.

[46] Stating that 38.23(a)'s purpose is "to deter unlawful conduct on the part of law enforcement personnel and to close the door of our courts to illegally obtained evidence."

underscore the need for training on proper oath-related procedures to comply with Rule Three. *See Hyland v. State*, 574 S.W.3d 904, 916 (Tex. Crim. App. 2019).[47]

D. Rule Three's oath of affirmation is grounded in solemnity, seriousness, and responsibility—all of which are gravely lacking here.

This Court has said that the purpose of an oath is to "call upon the affiant's sense of moral duty to tell the truth and instill in him a sense of seriousness and responsibility." *Smith*, 207 S.W.3d at 790. The oath ensures that the truth will be told by insuring that the affiant is impressed with the solemnity of his words. *See id.* N.13.[48] The oath is a matter of substance, not form. *Id.*[49] It is supposed to remind the affiant and the magistrate of the importance and solemnity of the process involved. *Id.*

Mr. Wheeler submits that this factual record gravely lacks seriousness and responsibility. The warrant underpinning the search of Mr. Wheeler's body had little more solemnity of process than a waiter's ticket, hurriedly

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[47] Hervey, J., concurring; Richardson, Walker, and Slaughter, JJ., joined.
[48] Quoting *United States v. Turner*, 558 F.2d 46, 50 (2nd Cir. 1977).
[49] Quoting *State v. Tye*, 2011 WI 124, 248 Wis. 2d 530, 636 N.W.2d 473, 478 (Wis. 2001).

scribbled and thrown at a short-order cook. Rule Three of the Texas Constitution surely demands more.

Conclusion and Prayer

The Court of Appeals for the Second District of Texas correctly applied *McClintock* by ruling that 38.23(b)'s good faith exception cannot apply to the singular, unusual, and bad facts of this case. *McClintock's* objectively reasonable officer is not perfect. But she is objective. And on this record, she would not consider this warrant to be without unconstitutional taint.

Mr. Wheeler asks this Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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